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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

FEB 17 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM DOCKET NO. 92-265
	)	
Development of Competition and Diversity in Video Distribution and Carriage	)	

To: The Commission

REPLY COMMENTS OF AMERICAN TELECASTING, INC.

American Telecasting, Inc. ("ATI"), by its attorneys, hereby replies to initial comments submitted by various entities in the captioned rulemaking proceeding. Specifically, ATI takes issue with proposals advanced by several cable-related interests which are incongruent with the plain intent of Congress.

I. Introduction

ATI presently operates wireless cable systems in Colorado Springs, Colorado; Orlando and Fort Myers, Florida; and Toledo, Ohio, with plans to establish additional systems in other markets in the near future. ATI's systems serve approximately 20,000 subscribers, the majority of whom live in neighborhoods where traditional cable service is available. ATI's growth, however, has been thwarted because of the inability to access Turner Network Television ("TNT") programming and certain

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regional sports programming.

ATI appreciates efforts the FCC has undertaken in recent years to facilitate genuine competition in the multichannel video marketplace. We are concerned, however, that the Commission not fall short at this very critical juncture of putting into place a regulatory framework which will ensure -- finally -- that wireless operators have adequate access to programming on fair and reasonable terms. For this reason, ATI emphatically endorses the comments of the Wireless Cable Association International, Inc. ("WCA") and urges the FCC to adopt WCA's recommendations.

II. Retroactive Scrutiny of Exclusive Contracts Is Necessary, Lawful and Reflects the Intent of Congress

Turner Broadcasting System ("TBS") urges that the anti-discrimination rules mandated by Section 628 should be applied prospectively to new transactions only, on the theory that retroactive scrutiny would have detrimental reverberations in the cable industry. TBS asserts that retroactive regulation would be improper because Congress did not give clear direction on this score in the Act. Comments of TBS at 2-3. Moreover, TBS urges the FCC to permit exclusive arrangements for new services on a permanent basis unless a complainant can demonstrate such an arrangement is not in the public interest. In a similar vein, Cablevision, Comcast and Cox propose that exclusive contracts for new services for five years be presumed valid. Comments at 17-18.

First, retroactive regulation of existing contracts, far from being problematic, must be the fundamental starting point if the Commission is to give true substance to the non-discrimination provisions of Section 628. Any number of extant contracts, foreclosing wireless operators from crucial access to programming, already have stultified competition in markets where wireless cable systems are in operation. Operators in these markets must have relief quickly, and consideration of existing contracts in the first instance is a necessary and lawful procedure.[1]

Fortunately, the most straightforward reading of the statute dictates that retroactive review of existing contracts comports with the intent of Congress. Plainly, Congress' specific exemption of exclusive contracts entered into prior to June 1, 1990 would have been irrationally redundant had the legislators actually contemplated the categorical exemption urged by TBS and others. Because administrative agencies are obliged to construe federal statutes in such a fashion as to preserve consistency and parsimony -- the cardinal rules of statutory construction -- the FCC must reject the notion that Congress intended that any contracts be grandfathered beyond those in the explicitly defined class. *See, e.g., United States*

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[1] In the instant context, the Contracts Clause (Art. I, §10, cl 1) imposes no constitutional barrier to retroactive review of existing contracts. *See Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986) (Contracts dealing with a subject matter which lies within the control of Congress have a "congenital infirmity" and cannot be removed from review where necessary in light of the statute's purpose.)

v. Raynor, 302 U.S. 540 (1938) (Avoid statutory constructions which create inconsistencies where reasonable interpretation can be adopted which will not do violence to plain words of the act and will carry out the intention of Congress); *Achilli v. United States*, 353 U.S. 373 (1957) (Render statutes so as to give coherence to what Congress has done within the bounds of a fair reading of the legislation.)

III. Future Contracts of Exclusivity Should Not Be Treated As Presumptively Valid

As to the suggestion by some commenters that exclusive contracts entered into after the effective date of the Act be treated as presumptively valid, ATI concurs completely with the position of the WCA on this point. Comments of WCA at 34-36. A requirement that victims of discriminatory conduct have the burden of proof to demonstrate discrimination, would be an indefensible rendering of Congress' plain intent.

Allocating the burden of proof -- the duty of affirmatively proving the facts in dispute -- to the complainant saddles him with what will often be an insuperable hurdle, inasmuch as records and other potential evidence of discrimination typically will be within the possession of the cable company or programmer. The litigation-style efforts the complainant would have to undertake to gain information required to affirmatively prove his case would offer him no more genuine recourse, as a practical matter, than antitrust litigation has offered him in the past. If the FCC's objective is to get at the truth of the matter expeditiously, the burden of carrying evidence forward

should be on the party who possesses the evidence, not the wireless operator.

ATI agrees with WCA that a useful procedural framework is one which the Commission already has vast experience administering, namely, the discrimination inquiry under Section 202 of the Communications Act. In that analysis, the allocation of the burden of proof is appropriately a function of which entity is best equipped to proffer dispositive evidence. *See, e.g., In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services,* 77 FCC 2d 274 (1980) (burden of proof to establish the justness and reasonableness of tariff restrictions at issue lies with the carrier). An abundance of case law construing Section 202 and related provisions exists already, and would benefit parties as well as the FCC as complaints of discrimination in the instant context are resolved.

In this connection, ATI rejects the contentions of several commenters that a complainant in order to make his case must demonstrate actual harm. As WCA pointed out in its comments, the Act creates a cause of action in the aggrieved party if the effect *or purpose* of the actions complained is unlawful discrimination. Therefore, a requirement that actual harm be shown would fly in the face of plain statutory language to the contrary, and should not be adopted.

III. Asserted Grounds For Programming Rate Disparity Are Illusory

TBS attempts to justify disparate programming rates on the

grounds that administrative costs for serving wireless cable subscribers are higher because penetration rates are lower, MMDS systems have lower channel capacity, are not secure from signal theft and are technically inferior to cable. Comments of TBS at 11-12. Viacom International, Inc. justifies higher licensing fees on the basis of "the greater financial risks associated" with wireless operators by virtue of their "tend[ency] to default on obligations at a substantially greater rate than cable operators." Comments of Viacom International, Inc. at 47-49. This familiar litany of criticisms, which once held sway in the programming industry, is anachronistic and should be discarded. Experience has proven time and again the technical and economic viability of wireless systems who are able to acquire adequate programming. In any case, these self-serving criticisms are unsupported by any evidence and thus carry negligible probative value.

Indeed, compelling evidence marshalled by WCA previously has demonstrated just the opposite. MMDS systems are actually more secure than coaxial facilities because all MMDS systems are addressable, whereas only certain channels are scrambled in most conventional cable operations. Moreover, significant numbers of cable systems offer a number of channels quite comparable to that of wireless ventures, but nonetheless enjoy lower program rates. As to the claim that disparity is warranted because of the economics of lesser capacity systems, it could as easily be posited that any given channel is likely to be watched more

often on a smaller system, suggesting that the programming cost to these systems should actually be lower than it is for larger ones. The essential point is that the cable industry's hackneyed criticisms of wireless cable have been repeatedly debunked and should not be given new credence in this proceeding.

IV. An Expansive Attribution Standard Is Imperative To Achieve Congress' Intent

It is crucial that the Commission adopt an attribution standard sufficient to check a cable operator's power to affect fair access to programming. TBS urges that the attribution standard should be no more onerous than the standard in the broadcast context. Comments at 14-15. Liberty Media Corp. (Comments at 11-17), echoed by Continental Cablevision, Inc. (Comments at 5-8), advocates "majority control" as the appropriate standard.

ATI urges that attribution rules be restrictive due to the control that owners of even five percent of the equity of widely-held companies can exert. ATI strongly endorses the recommendation of the WCA that the new attribution rule should be modeled on former Notes 1 and 2 to Section 63.54 of the FCC's rules. Those rules, restricting a telephone company's participation in programming, deemed an interest attributable where an "element of ownership or other financial interest" in common existed or "where any party has a financial interest in both" entities in question. Given the anti-competitive conduct which vertically integrated cable companies have demonstrated historically, this type of attribution standard is necessary to ensure

wireless operators fair access to programming from now on.

V. Conclusion

ATI has struggled for several years with the principal obstacle facing virtually all wireless cable operators: access on fair and reasonable terms to the programming consumers demand. It is not an exaggeration to say that the bulk of ills plaguing wireless cable ventures today are rooted in that single cause. In this proceeding the FCC has the opportunity to act decisively to benefit consumers by ensuring wireless operators fair access to programming. ATI believes that the specific proposals set forth by WCA in its comments will achieve that goal, and we urge the FCC to adopt WCA's recommendations.

Respectfully submitted,

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